STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2005
v	No. 250332 Kent Circuit Court
NGOC PHAT TRAN, a/k/a QUANG HANG, Defendant-Appellant.	LC No. 02-011062-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, and two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84. Defendant was sentenced to life imprisonment for the murder conviction and to 80 to 120 months' imprisonment for the assault convictions. We affirm.

This case arises out of an incident at a nightclub. As defendant was leaving the nightclub, he discovered that two of his friends had been assaulted by a group of people. Defendant got into his car, along with his girlfriend, and one of his injured friends, and then drove straight into a crowd of people standing outside the nightclub. Defendant struck several people, one of whom suffered a fatal head injury.

Defendant first contends that his trial counsel rendered ineffective assistance by failing to present either the defense of self-defense or defense of others and by failing to request jury instructions on these defenses. We disagree. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Where a defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance of counsel, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this burden, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under the circumstances and according to prevailing professional norms and then must show that there is a reasonable probability that but for counsel's errors, the trial outcome would have been different. *Id.* at 663-664 (citations omitted).

Defendant's trial counsel elected to present a defense based on the theory that defendant struck the victims unintentionally as the result of his panicky flight from a potentially dangerous situation. The decision not to present a specific defense, in and of itself, does not constitute ineffective assistance, see, e.g., *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995); *People v Lloyd*, 459 Mich 433; 590 NW2d 738 (1999), nor does presenting one defense instead of another possible defense, in and of itself, constitute ineffective assistance. *LaVearn, supra*. The defenses defendant now claims should have been presented are not well supported by the evidence presented in the record, and his trial counsel cannot be faulted for choosing the strongest of the several defenses. *Id.* at 216. Furthermore, although defendant correctly notes that he could have presented inconsistent defenses, see *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), defendant has failed to overcome the strong presumption that his trial counsel's decision to present the accident defense alone was nothing more than sound trial strategy. This Court will not "substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant next argues that the search of his outgoing and incoming mail while imprisoned violated his reasonable expectation of privacy under the Fourth Amendment. Defendant failed to object to the use of the letters at trial and, consequently, has forfeited the issue for appellate review. *People v Grant*, 445 Mich 535; 553; 520 NW2d 123 (1994). Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court may reverse only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 763-764.

The United States Supreme Court has ruled that an incarcerated person has no reasonable expectation of privacy in his prison cell. *Hudson v Palmer*, 468 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984). Even if an incarcerated person did have such an expectation, the law permits jail authorities to open a prisoner's mail for reasons of internal security. *People v Paul Williams*, 118 Mich App 117, 121; 325 NW2d 4 (1982). Although defendant correctly observes that the prosecution never established that opening the letters was necessary for jail security, the rule does not require such a specific showing. *Id.* at 121. Consequently, there was no plain error. Likewise, given that the letters were not seized in violation of defendant's Fourth Amendment rights, defense counsel could not be ineffective for failing to advocate for their exclusion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant next argues that the prosecution violated a stipulation between the parties by eliciting testimony concerning a prior bad act. Defense counsel waived the issue for appellate review by stating on the record, after his initial objection, that his objection had been met. *People v Carter*, 462 Mich 206, 215-218, 219-220; 612 NW2d 144 (2000). Because defendant waived, rather than forfeited the issue, there is no error to review. *Id.* at 219-220.

To the extent that defendant is appealing the admission of the evidence on the grounds that it was not relevant, he failed to object to its admission on the same ground he has asserted on appeal. *Weiss v Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997); MRE 103(a)(1). As a result, the claim of error was not preserved and we will review it for plain error affecting substantial rights. *Carines*, *supra* at 763. At trial defendant testified that he left Virginia to find work. On cross-examination plaintiff elicited an admission from defendant that he in fact left Virginia because he was in trouble. Thus the testimony was relevant as impeachment evidence.

Defendant next argues that the trial court erred when it failed to give an instruction on gross negligence as part of its instruction on involuntary manslaughter. Defendant failed to object to the failure to instruct on gross negligence and, as a result, has forfeited the issue for appellate review. *Carines*, *supra* at 763. The omission of an instruction on gross negligence did not constitute plain error affecting substantial rights because the evidence overwhelmingly showed that defendant deliberately drove his vehicle into a crowd of people.

Defendant next argues that, by considering facts at sentencing other than those upon which the jury convicted him, the trial court violated the rule established in *Blakely v Washington*, 542 US ___; 124 S Ct 1493; 158 L Ed 2d 403 (2004). *Blakely*, however, has no application to this case. See *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). In any event, the trial court, when imposing sentence, properly considered uncharged criminal activity, pending criminal charges, and criminal activity for which defendant has been acquitted. *People v Ewing (After Remand)*, 435 Mich 443, 473; 458 NW2d 880 (1990).

Finally, defendant argues that the trial court erred when it sentenced him to life imprisonment. Defendant's life sentence falls within the guidelines' range. When the trial court's sentence is within the appropriate guidelines range, "the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). The standard of proportionality does not come into play unless the sentence departs from the sentencing guidelines. *Id.* at 262.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper